United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7053

To be argued by
JOSEPH ARTHUR COHEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

WILLIAM GARAFOLA,
Plaintiff-Appellee,

—against—

F. A. DETJEN, "SAAR",
Defendant & Third Party Plaintiff,

—against—

PITTSTON STEVEDORING CORP.,
Third Party Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THIRD PARTY DEFENDANT-APPELLANT'S BRIEF

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INDEX

TABLE OF AUTHORITIES

Cases:

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Preliminary Statement

Plaintiff longshoreman commenced this action to recover damages for personal injuries sustained on December 20, 1969, aboard a vessel owned by the defendant and third party plaintiff (5a).* He obtained a recovery of $235,000 against defendant (52a), who in turn recovered indemnity from the third party defendant (52a). Plaintiff's recovery was solely for unseaworthiness and not for negligence (52a).

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* Unless otherwise indicated, all references are to the Appendix on Appeal.

Thereafter, appropriate post trial m[illegible]ly defendant and third party defendant for judgme[illegible]v., or, alternatively, for a new trial, were denied b[illegible] court below (53a). This appeal follows.

The Proof on Trial

The plaintiff was injured while trying to exit from the hold where he had been working by climbing up the face of a pile of pallets stowed therein. In so doing, he lost his balance and fell to the deck below. There was neither claim nor proof of any defect in or foreign substance on the pallets. Nor was there any proof that the pallets so stowed were designed for or intended to be used as a ladder (7a, 8a, 14a, 19a). Plaintiff had climbed up approximately 10 pallets before losing his balance and falling (15a).

The hold was equipped with a permanent metal ladder which had been used by plaintiff to enter (11a-12a). However, during the course of the loading operations that day, the stowage of containers by the longshoremen blocked access to the ladder (12a, 13a, 16a). The manner of container stowage was normal and proper according to the uncontroverted testimony (45a).

Plaintiff was personally aware that climbing up the pallets was a dangerous practice, and testified (18a):

> "Q. Mr. Garafola, did you think it was dangerous to climb those pallets? A. Yes."

Plaintiff sought to excuse his action by suggesting that he had merely been following orders of his hatch boss. But there was no proof of any direct order by the hatch boss for plaintiff to climb up the pallets. The proof was

that when the hatch boss ordered the longshoremen out of the hold, the plaintiff and his co-workers requested him to supply a portable ladder (7a). The hatch boss did not supply a portable ladder, but merely ordered the men out of the hold (15a-16a). Plaintiff testified as follows (17a):

> "Q. When you asked for a ladder was the acting hatch boss looking down over the coaming at you? A. Yes.
>
> Q. He saw you? A. Yes.
>
> Q. He saw you standing on the ledge? A. Yes.
>
> Q. Do you know whether he saw you climb the pallets? A. He gave us orders to come up.
>
> Q. Did he order you to— A. He said come on up. I can't fly there.
>
> Q. He saw the pallets there? A. Yes."

The requests for a portable ladder were solely to plaintiff's own hatch boss. No ship's personnel were present at the time of this incident (15a), nor was there any proof at all that the shipowner was aware of what was taking place (16a).

The undisputed testimony was that it was the duty of the stevedore, not the shipowner, to supply portable ladders to the longshoremen if needed (43a-44a). However, the court permitted plaintiff's attorney to read to the jury certain provisions of the *"Safety and Health Regulations for Longshoring"* relating to ladders *as part of his case against the defendant shipowner* (40a-41a). Further use of those regulations *against the shipowner* was made in summation by plaintiff's attorney as follows (45a-46a):

> "However, once you are up here with an empty container here and you have 16 feet you can fall, the safety regulations, which I will read to you and

the law says this must be followed and the Court will so instruct you:

> 'When an edge of a hatch section or stowed cargo more than 8 feet high is so exposed that it presents a danger of an employee falling the edge shall be guarded by a safety net of adequate strength to prevent injury to falling employees or by any other means providing equal protection under the circumstances.'
>
> No net and no other protection."

Such erroneous use of these regulations *against the shipowner* was then compounded by the court in its charge during the course of which, and at the request of plaintiff's attorney, it read the regulations to the jury without instruction that they were not applicable to the defendant shipowner but were material only to the indemnity action against the stevedore (49a-51a).

In an impassioned summation counsel for the plaintiff further emotionally described the injuries and pain and suffering allegedly sustained by his client (47a-49a). Thus, counsel calculated that according to him the plaintiff had in his lifetime a remaining 3,650 days of pain and suffering, consisting of 90,000 hours thereof (48a). He thereafter stated (48a-49a):

> "What more can I say about this case that you haven't heard and seen."
>
> *"I grow emotional. I can yell and scream but I don't have to. That screams out loud enough* (indicating plaintiff). *I don't have to."*

Thereafter counsel advised the jury that the plaintiff was suing for $500,000 (49a).

At the time of trial plaintiff was 68 years old (35a). He was 63 at the time of the accident (21a), and had been employed as a longshoreman for 17½ years (5a). Prior to that time, plaintiff had been a prizefighter (17a).

During the two year period immediately prior to the accident, plaintiff earned approximately $11,000. per annum (11a). His medical expenses were stipulated to be $16,000 (5a).

The plaintiff stated that in falling he hit his leg on some of the pallets on the edge of the container and his back and elbow, but that he did not hit his head on any object (8a). However, he alleged that after the accident he began getting noises in his ear (8a).

He was hospitalized for approximately five months after the accident (8a) and thereafter ambulated with the use of crutches and a cane (8a, 9a) after an initial period when he was confined to the use of a wheelchair (9a).

At the trial he complained of pain in his right leg, shoulder and right elbow and of buzzing in his ear. He further asserted that from the date of the accident to the date of trial he had not returned to work (11a).

In connection with these complaints, the testimony of Dr. Barenfeld (plaintiff's only medical witness) was quite illuminating. Dr. Barenfeld testified that the plaintiff had a tumor in his right shoulder which was not due to the accident and that no fracture was noted in that shoulder (25a). Dr. Barenfeld also testified that the plaintiff had limited motion of the right elbow *prior* to this accident (26a).

Dr. Barenfeld also found the plaintiff had a cauliflower ear due to his earlier occupation as a boxer (26a).

The ramifications emerging from the plaintiff's prior occupation as a boxer were fully explored at the trial. It

was thus testified to by the plaintiff that he had been a professional boxer having fought, among others, Benny Leonard and Ruby Goldstein in the course of a twelve year fighting career. He admitted that he had gotten hit often in the face and head and about the ears (17a) in the course of his career. He admitted that he had also been operated upon for a tin ear in the course of his career (20a). He also admitted a prior injury to his right elbow in 1968 for which a claim had been made (20a).

It appeared from the testimony of Dr. Barenfeld, referred to above, that the only objective evidence of any injury sustained by the plaintiff, found by him in the course of his examination of the plaintiff was the aforesaid injury to his leg (39a). He admitted on intensive cross-examination that in his opinion the blows that the plaintiff received as a prize fighter in the course of his boxing career could have caused the tinnitus or ringing of the ears complained of by the plaintiff (35a). He also admitted that any hearing loss on the plaintiff's part could be due to age alone (35a-36a). He also asserted that the plaintiff could do work of a sedentary nature if he so desired (36a-37a).

Upon further cross-examination Dr. Barenfeld stated that notwithstanding that the plaintiff complained of limitation of motion in his right elbow as a result of this accident, in fact, such limitation was the result of a prior injury not related to this accident (39a). Similarly, he stated on cross-examination as noted above, that any pain in the plaintiff's right shoulder was not related to this accident (39a).

Dr. Barenfeld testified on direct examination that x-rays taken of the plaintiff revealed a fracture of the lower end of the right tibia and fibula, with some ossification of the

Achilles tendon (25a). At the time of the plaintiff's discharge from the hospital Dr. Barenfeld noted that the hospital diagnosis stated that the plaintiff had sustained a compound fracture of the distal right tibia and fibula, evulsion of skin of the right distal fibula and contusion of the right shoulder. Dr. Barenfeld's diagnosis upon his examination was that the plaintiff had sustained a mal united compound fracture of the distal right tibia and fibula with post traumatic arthritis of the ankle joint (33a-34a).

This appeal has been taken because appellant believes that the record in this case does not disclose a prima facie case of unseaworthiness and hence plaintiff's action against defendant shipowner should be dismissed. Alternatively, a new trial should be granted because of error committed in the use of the safety and health regulations, and because the verdict was grossly excessive.

POINT I

The proof on trial did not show any unseaworthy condition that proximately caused plaintiff's accident, and the defendant's motions for a directed verdict and for judgment n.o.v. were erroneously denied.

As the proof on trial discloses, the ship was in all respects fit and proper. It had all the necessary and required gear and equipment for its intended purpose and it is nowhere contended that any such gear or equipment was defective or broke. The accident occurred solely because of what may be termed the "operational negligence" of the plaintiff and his co-workers, for which the plaintiff is not entitled to a recovery against the shipowner.

The vessel was properly equipped with a permanent ladder offering access to and egress from the hold (11a-

12a). The plaintiff did not use that ladder in attempting to exit from the hold at the time of the accident because he claimed that it was blocked by the container cargo that had been stowed by him and his co-workers during the course of the day. However, the undisputed proof was that the manner in which that container cargo was stowed was completely proper (45a).

At the time of the accident the plaintiff was trying to exit from the hold by climbing up a pile of pallets. There was no claim or testimony that the pallets on which he was climbing broke. Rather, the sole claim was that plaintiff lost his balance while climbing these pallets. It was not claimed that any peculiar condition on or about the pallets caused plaintiff to lose his balance.

There was no proof whatever that the plaintiff was given these pallets by the defendant shipowner as a means of exiting from the hold, or that any request was ever made by anyone to the defendant shipowner for a further means of egress from the hold. Plaintiff's own uncontradicted proof is that requests were made to his own hatchboss for a portable ladder and that he was merely told by his own hatchboss to come out.

The danger of climbing pallets was recognized by the plaintiff himself (18a) and the impropriety of using pallets for such a purpose was corroborated by the expert Keeler (43a). There was no proof that the defendant shipowner was in any way aware of or participated in the plaintiff's decision to come out of the hatch by climbing up the pallets.

That decision on the part of the longshoremen to refrain from waiting for a portable ladder and to climb out of the hold by means of the pallets—a decision in no way known to or participated in by the defendant shipowner—con-

stitutes no more than operational negligence on the part of the stevedore for which a shipowner is not liable, *Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494, 91 S. Ct. 514 (1971). Just as in the cited case the shipowner was held not to be liable for the negligence of a longshoreman in operating a non-defective winch, so in the instant case is the shipowner not liable for the negligence of the longshoremen in trying to utilize pallets as a means of climbing out the hatch.

The isolated and personal negligent acts of longshoremen do not render a vessel unseaworthy. As was stated by the United States Supreme Court in *Usner*, (400 U.S. at 500, 91 S. Ct. at 518):

> "What caused the petitioner's injuries in the present case, however, was not the condition of the ship, her appurtenances, her cargo, or her crew, but the isolated, personal negligent act of the petitioner's fellow longshoreman. To hold that this individual act of negligence rendered the ship unseaworthy would be to subvert the fundamental distinction between unseaworthiness and negligence that we have so painstakingly and repeatedly emphasized in our decisions. In *Trawler Racer, supra,* there existed a condition of unseaworthiness, and we held it was error to require a finding of negligent conduct in order to hold the shipowner liable. The case before us presents the other side of the same coin. For it would be equally erroneous here, where no condition of unseaworthiness existed, to hold the shipowner liable for a third party's single and wholly unforeseeable act of negligence. The judgment of the Court of Appeals is affirmed."

There was no proof whatever in this case to show that in any way the shipowner failed to comply with its duty of

initially furnishing a vessel and appurtenances fit for their intended use. Nothing more is required of it, *Blier* v. *United States Lines Co.*, 286 F. 2d 920; and *Mitchell* v. *Trawler Racer Inc.*, 362 U.S. 539. The ship in question was admittedly supplied with a permanent metal ladder for use in entering and leaving. If a supplemental portable ladder became necessary, the undisputed proof was that it was the stevedore's duty to provide the same as called for (43a-44a). If, as was here suggested by plaintiff and his witnesses, the hatchboss did not obtain a portable ladder on request but rather ordered the plaintiff to climb up the pile of pallets, then such act of negligence on his part does not create liability on the defendant-shipowner. *Such an improvident order does not make the vessel any less seaworthy than did the winch operators negligence in* USNER.

If it was not at all contributorily negligent for the plaintiff to knowingly undertake the dangerous practice of climbing up the pile of pallets, *cf. Pisano* v. *S.S. Benny Skou*, 346 F. 2d 993, then on what basis can it be said that the defendant shipowner—who was not aware that the pallets were being so used and who had not furnished the pallets for any such case—may be liable?

A case almost on all fours with the instant one is that of *Guarracino* v. *Luckenbach S.S. Co.*, 333 F. 2d 646 (2d Cir. 1964). There, as here, a longshoreman sued for injuries sustained in a fall while attempting to climb from the hatch of a vessel. There, as here, the longshoreman, rather than waiting for a portable ladder to be supplied him by his hatchboss sought to climb up a stack of cartons. In upholding the dismissal of the plaintiff's action against the shipowner, this Court stated that since the ship was properly equipped the shipowner had breached no duty to the plaintiff. And, this Court further held that since the cartons

were never intended to serve as a ladder, the plaintiff's use of the same for that purpose could not be held to create an unseaworthy condition.

Similarly, in the instant case. The decision of the plaintiff and/or his hatchboss to use the pallets to climb out of the hatch was to put those pallets to a purpose never intended. Their negligence in so doing does not create unseaworthiness liability for the shipowner.

Again, in *Caputo* v. *Kheel,* 291 F. Supp. 804 (S.D.N.Y. 1968) a shipowner was exonerated from any liability to a longshoreman who fell while climbing up something "which was never intended to serve as a ladder."

Where, as here, the longshoreman is injured aboard ship because of the negligence of himself or his co-workers, without any participation therein by the shipowner, his remedy is compensation and he is not entitled to an unseaworthiness recovery against the vessel owner, see *Virgona* v. *Farrell Lines, Inc.,* 366 F. Supp. 713 (S.D.N.Y. 1973).

If the proof in this case established anything, it established that this accident resulted from the plaintiff's attempt to use a pile of pallets as a ladder, perhaps on orders from his own hatchboss. That proof does not establish a prima facie case of unseaworthiness and the defendant's motions for a directed verdict and for judgment n.o.v. should have been granted. The judgment in the instant case should be reversed and plaintiff's action dismissed.

POINT II

It was reversible error, warranting a new trial, for the court below to permit counsel for the plaintiff to utilize the Safety and Health Regulations for Longshoring as against the defendant shipowner.

As noted above, the plaintiff's attorney read sections of the Longshoring Regulations to the jury as part of his case and he thereafter referred to the same in the course of his summation. Such regulations related to the duty of the stevedore of supplying ladders and safety nets to its employees, as required. Thereafter, the Judge in his charge to the jury again read the aforesaid regulations to the jury and did so at the specific request of counsel for the plaintiff. In so doing, the Judge did not distinguish between the action of the plaintiff against shipowner and the action of shipowner against the stevedore. In such circumstances it must be concluded that such regulations were read to the jury by the Judge as part of his charge to be taken into consideration by the jurors both with respect to plaintiff's claim against shipowner and shipowner's claim against stevedore. It is respectfully submitted that such constitutes reversible error.

It is no longer open to question in this circuit at least, that such regulations form no proper part of a plaintiff's case against a shipowner and that the use of such regulations constitutes reversible error, *Bernardini* v. *Rederi A/B Saturnus,* 2nd Cir., Docket No. 74-1404, Calendar No. 113, decided by this Court March 11, 1975. In that case it was contended by shipowner, as it is contended herein, that it was erroneous for the Judge to charge that the aforesaid regulations applied in the plaintiff's case against the shipowner. This Court specifically upheld that contention and stated:

> "Our reversal on the ground that the jury returned irreconcilable special verdicts makes it unnecessary for us to pass upon the correctness of the trial court's instructions dealing with the applicability of the Health and Safety Regulations for Longshoremen to the issue of the shipowner's liability. Inasmuch as we are remanding for a retrial it is not inappropriate to note that *Albanese* v. *N.V. Nederl. Amerik Stoomv. Maats,* 346 F.2d 481 (2 Cir. 1965), *rev'd on other grounds,* 382 U.S. 283 (1966), remains the law of this circuit."

In *Albanese,* this Court similarly held that the aforesaid regulations relating to stevedoring practices are not relevant to the issues involved in the claim of the plaintiff against the shipowner, either with respect to negligence or unseaworthiness, and that the introduction of such regulations on behalf of the plaintiff in his case against the shipowner could only serve to confuse the jury.

It is respectfully submitted that such is precisely what resulted in this case.

Thus, the introduction of such regulations relating to the furnishing of ladders and safety nets as part of the plaintiff's case and as part of the subsequent charge to the jury could only have resulted in confusing the jury into concluding that any failure to comply with such regulations on the part of the shipowner rendered the vessel unseaworthy. Surely, such is not the law as indicated both by *Albanese* and *Bernardini, supra.* As noted in Point I, *supra,* there is no evidence in this case that the shipowner was under any duty to provide a ladder or safety net *at the time in question.*

Thus, the aforesaid regulations were entirely irrelevant with respect to the plaintiff's claim against the shipowner,

since even if such regulations were violated by the stevedore, to whom and only to whom such regulations are directed, such violation would not render the vessel unseaworthy. Any such violations of regulations would, at most, be admissible and perhaps determinative in the indemnity action by shipowner against the stevedore, *after the liability issues between the plaintiff and the shipowner had already been completely litigated.*

Since counsel for the plaintiff repeatedly stressed the importance of such regulations both as part of his case and as part of the charge to the jury, it is understandable perhaps that the jury, in a confused state, took those regulations as being binding upon the shipowner and concluded that the violation of such regulations imposed liability on the shipowner, contrary to law and contrary to this Court's decisions in *Albanese* and *Bernardini.*

Since it clearly appears that the verdict of the plaintiff against the shipowner may have at least, in part, been predicated upon confusion and misunderstanding on the part of the jury with respect to the import and binding effect of such regulations, it should not be permitted to stand. Under the authority of the *Albanese* and *Bernardini* cases, this Court should therefore reverse the action of the Court below and remand this case for a new trial.

POINT III

The award of $235,000 was grossly excessive.

As aforesaid, plaintiff's own physician, Dr. Barenfeld, found that any limitation of motion or complaints of pain in the right elbow or right shoulder were *not* related to the accident in question. The only claimed injury supported by medical proof was a fracture of the lower end of plaintiff's right tibia and fibula with some ossification of the Achilles tendon. The plaintiff was left with a mal united compound fracture with post traumatic arthritis in the ankle joint and with limitation of motion therein (33a-34a).

Although he had a right sided limp and was using a cane, the plaintiff was in no acute distress (30a).

Plaintiff was 63 years of age at the time of the accident and had a working life expectancy as a longshoreman to age 65, *Yodice* v. *Koninklijke et al.*, 443 F. 2d 76. As aforesaid, his record showed average earnings of $11,000 per annum. Under the circumstances, it is respectfully submitted that a verdict of $235,000 is excessive in the instant case.

It is to be noted that at a conservative interest rate of 6% (considered conservative because banks are advertising guaranteed effective annual interest rates of 8.17%) an investment of $235,000 would generate interest income of $14,100 each year, with the principal remaining intact. Such a sum would be substantially more than the plaintiff earned a year before the accident. Additionally, such an interest income would be received by the plaintiff for each and every year of his entire life, in contrast to a cessation of earnings when his work life ended.

We do not dispute that the plaintiff sustained a serious injury. We do submit, however, that an objective evaluation of the same requires either a new trial or a remittitur of at least $100,000, see e.g., *DeMauro* v. *Central Gulf S.S. Corp.*, 74-2243 (2 Cir., March 28, 1975).

This Court has the right to examine the amount of verdicts and to set aside or reduce those which are excessive, *Caldecott* v. *Long Island Lighting Company*, 417 F. 2d 994; and *Dagnello* v. *Long Island Railroad Company*, 289 F. 2d 797. This power has been exercised by this Court in appropriate cases, see *Wickes* v. *Henken*, 378 F. 2d 395; *Sharkey* v. *Penn Central Transportation Company*, 493 F. 2d 685; and most recently, *DeMauro* v. *Central Gulf S.S. Co., supra.*

In *Imperial Oil Ltd.* v. *Drilk*, 234 F. 2d 4 the plaintiff was a 64 year old longshoreman who sustained fractures of 5 or 6 ribs, fracture of the left shoulder, fracture of the middle third of the right fibula and fracture of both bones of the left ankle. An award of $20,400 for pain and suffering was considered reasonable and an award of $33,000 for loss of future earnings was reduced to $25,000, with the Court stating (p. 12):

> "We believe, however, that the award for lost wages in the future failed to give adequate consideration to the advancing age of appellee through the end of his life expectancy, the probable inability of appellee to continue full time employment until 78 years of age in a field of physical and sometimes hazardous labor, and the other hazards of continuous employment to which every employee is normally subject in our present industrial system. Thompson v. Camp, 6 Cir., 163 F. 2d 396, 403; Vicksburg & M.R. Co. v. Putnam, 118 U.S. 545, 7 S. Ct. 1, 30 L. Ed. 257; Florida East Coast R. Co.

v. Young, 104 Fla. 541, 140 So. 467, 87 A.L.R. 905; Mazziotte v. Bridgeport & W. Passenger Service, 116 Conn. 32, 163 A. 409, 87 A.L.R. 908."

In *Marshall* v. *Ove Skou Rederi A/S,* 283 F. Supp. 188 (1968) a longshoreman who suffered a crushed ankle which resulted in 25% permanent partial disability to the body as a whole and disabled him from any laborious work received an award of $39,285.

For the amputation of a leg four inches below the hip and for other injuries to his genitals, a seaman was awarded $75,000 in *Blanco* v. *Phoenix Compania de Navigacion,* 304 F. 2d 13 (1962). The loss of a leg to a 19 year old seaman resulted in an award of $115,000 in *Aivaliotis* v. *S.S. Atlantic Glory,* 241 F. Supp. 568 (1963); and the loss of a leg to a 53 year old longshoreman resulted in an award of $118,000 in *Thompson* v. *Calmar Steamship Corp.,* 331 F. 2d 657 (1964).

Similarly, in *Belieu* v. *Murray,* 231 F. Supp. 579 (1964) an award of $150,000 was made to a 28 year old who sustained a leg amputation as well as other permanent injuries to the elbow, nose and other ankle. In *Stevenson* v. *Pennsylvania Railroad Co.,* 291 F. Supp. 364 (1968) the plaintiff sustained bi-lateral compound comminuted fractures of *both* legs with permanent 25 degree bowing of both legs which were permanently misshapen and scarred, with resultant loss of agility and walking capacity. The award was $100,000.

In *Audet* v. *New York Central Railroad,* 11 A.D. 2d 561 (1960) an award of $175,000 to a 53 year old plaintiff whose injuries resulted in amputation of his left leg was held excessive and reduced to $115,000.

In *Dagnello* v. *Long Island Railroad Company,* 289 F. 2d 797 (1961) an award of $97,000 to a 29 year old brakeman for the pain, suffering and loss of a limb which would permanently prevent him from engaging in normal activities thereafter was affirmed by this Court. In *Butler* v. *General Motors,* 143 F. Supp. 461, aff'd. 240 F. 2d 92 (1957) a remittitur of $40,000 was ordered on an award of $200,000 to a plaintiff who had sustained a leg amputation, operation on the knee and various fractures to the head and body. In *Jones* v. *Chesapeake & Ohio Railway Co.,* 371 F. 2d 545, there was an award of $97,660 to a brakeman who sustained fractures of the left thigh and right hip socket, a dislocated right hip, and other injuries requiring leg amputation. In *St. Louis Southern Railway Company* v. *Ferguson,* 182 F. 2d 949 (1950) injuries resulting in the amputation of both the left leg and the right arm and several fingers of the left hand gave rise to a recovery of $150,000.

In each of the above cited cases, the injuries sustained by the plaintiff were more severe, traumatic and disabling than the injuries sustained by the plaintiff in the case at bar. Yet the recoveries obtained by those plaintiffs do not approach the recovery obtained by the plaintiff in the case at bar. We believe that it is grossly excessive for a 63 year old longshoreman earning $11,000 a year to recover $235,000 for a fractured ankle. We believe that the amount of the verdict herein resulted from the passion and emotion displayed and mentioned by plaintiff's attorney in his summation. A new trial on this issue should be granted in the interests of justice. Alternatively, giving the plaintiff the benefit of all doubts, there should be a remittitur of at least $100,000.

CONCLUSION

The judgment of the Court below should be reversed and plaintiff's action dismissed as a matter of law by reason of plaintiff's failure to establish a prima facie case of unseaworthiness. In the alternative, it is requested that a new trial be had.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

PAUL KLEIN, being duly sworn, deposes and says:

That he is over eighteen years of age and is not a party to the within action. That on the 4th day of April, 1975, he served a true copy of the annexed

BRIEF

on

IRVING BUSHLOW, ESQ.
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Brooklyn, New York

KIRLIN, CAMPBELL & KEATING, ESQS.
Attorneys for Third-Party Plaintiff-Appellee-Appellant
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herein, by depositing a true copy of the aforesaid properly enclosed in a securely sealed and postpaid wrapper in a Post Office box under the exclusive care and custody of the Government of the United States, at 801 Second Avenue, in the Borough of Manhattan, City and State of New York, addressed to the aforesaid as above stated, and that said address(es) was (were) the address(es) designated by the said attorney(s) as the address(es) within the State of New York, where papers in this action might be served.

Sworn to before me this
4th day of April, 19 75.

Albert V. Testa
Notary Public

ALBERT V. TESTA
NOTARY PUBLIC, State of New York
No. 31-9308300 Qual. in N. Y. Co.
Commission Expires March 30, 1976